

## Cross-Cutters – Outline of Process

### NEPA process – 309(a)

- NEPA requires that all Federal agencies proposing legislation or any other major actions significantly affecting the quality of the human environment consult with other agencies having jurisdiction by law or special expertise over such environmental considerations, and prepare a detailed statement of these environmental effects (EIS).
- CAA Section 309 requires the EPA to review and comment on any federal agency's EIS. (not EAs).
- EPA Region 6 NEPA Office is the Region's lead office for NEPA review.
- EPA does not as a matter of course review EAs.

1. Scoping – Early formal coordination to ensure problems are identified and are properly considered.
  - Scoping requests come into EPA specifically by letter or through the Federal Register (Notices of Intent to prepare an EIS)
  - EPA responds with the anticipated level of participation, a list of permits required, significant environmental issues that should be addressed in the EIS, etc.
2. EPA as a Cooperating Agency – the lead agency may request that any other federal agency serve as a cooperating agency if it has jurisdiction or special expertise regarding any environmental issue that may be raised and considered.
  - If asked, Region 6 typically accepts an agency's invitation to be a CA

3. Draft EIS review

- EPA policy is to review and comment in writing on all draft EISs officially filed with the EPA.
- Comment goals:
  - Identify and recommend corrective action (avoidance, minimization or mitigation) for the significant environmental impacts
  - ensure that the draft has adequately meet the requirements of NEPA
- 45 day comment period
- Assign a Rating (provided in the comment letter) – combination of an alpha-numeric rating (representing the evaluation of the environmental impacts) and a number rating (adequacy of the draft) (for example, "EC-2")

Impacts	Adequacy
LO (Lack of Objections)	1 (adequate)
EC (Environmental Concerns)	2 (insufficient information)
EO (Environmental Objections)	3 (Inadequate)
EU (Environmentally Unsatisfactory)	

- EU-3 ratings – potential referral to CEQ
4. Post-Draft EIS follow-up – discussions between the agencies
  5. Review of Final EIS
    - EPA policy is to do a detailed review all EISs which had significant issues raised by EPA at draft stage. EPA may or may not comment on all final EISs.
    - Comment goals:
      - Major unresolved issues focusing on impacts rather than adequacy
      - Limited to issues raised in EPA comments on the draft
      - May raise major issues that have been identified as the result of information made available after publication of the Draft EIS
    - Possible referral to CEQ EU – if still unsatisfactory (EU), and as a last resort (Note: EPA rarely refers to CEQ)

## ESA Section 7 Consultations

- ESA Section 7(a)(2) requires that all federal agency's insure that that any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of designated critical habitat.
  - USFWS is the lead agency for land based species
  - NOAA, National Marine Fisheries Service (NMFS) is the lead agency for aquatic species, and sea turtles
  - Required Process - Federal action cannot proceed until Agency or applicant has received concurrence (informal consultation) or a final BO has been issued (assuming the agency has not made a "no effects" determination)
1. Identify the Federal Action – for EPA includes permitting and funding
  2. Prepare a Biological Evaluation or Biological Assessment (usually done by a consultant)
    - Obtain from the USFWS a list of threatened, endangered, or candidate species and identify critical habitat by county
    - Determine the Action Area – include site construction and the location of all interrelated and interdependent activities (power plant location and the gas or electric transmission lines must be considered within the action area)
    - Determine presence (or potential presence) of species or habitat within the action area - Qualified biologist/ecologist conducts a field survey if necessary
  3. Determination of effect –
    - Agency determines based on BE or BA whether a species is present in the action area
    - Includes direct and indirect impacts and interrelated and interdependent actions, no matter how small, and cumulative effects
    - Possible determinations:
      - i. "No Effect" – no listed species or critical habitat present (and no potential for the species to be present) within the action area
      - ii. "May affect, but is not likely to adversely affect a listed species or its critical habitat"
        1. Species or habitat is present or has the potential to occur within the action area
        2. Actions will not adversely affect a species
      - iii. "May affect"
        1. Species or habitat is present or has the potential to occur within the action area
        2. Actions will likely affect a species
  4. Consultation
    - **No consultation required** – "no effect" determination does not require the written concurrence from USFWS/NMFS, thus no consultation is required
    - **Informal Consultation** – "May affect, but will not likely adversely affect" determination Requires written concurrence from the USFWS or NMFS (Informal consultation)
      - Agency provides Biological Assessment to support its determination and a request for concurrence by letter. USFWS/NMFS has 30 by regulation to concur.
      - USFWS/NMFS may request avoidance or mitigation measures prior to giving concurrence
      - USFWS/NMFS may not concur and instead request formal consultation
    - **Formal consultation**
      - Required when an action agency determines the action may affect a listed species or habitat within the action area.
      - Action agency requests formal consultation with the USFWS or NMFS, or both
      - When USFWS/NMFS has complete information, the 135-day statutory clock starts for completion of consultation

- NOTE: although there is a *statutory* clock, it usually takes longer than this and can take years to get thorough formal consultation
- USFWS/NMFS issues a Biological Opinion– the following are required to be in a BO:
  - i. **Jeopardy opinion** – either “likely to jeopardize” or “not likely to jeopardize”
    - 1. Cannot be a “conditional” no jeopardy opinion based on proposed mitigation
  - ii. **Destruction or adverse modification of habitat** – BO will have a statement about critical habitat
    - 1. “harm” can constitute “adverse modification”
  - iii. Identify **reasonable and prudent alternatives (RPAs)** to an action likely to result in jeopardy
    - 1. Optional(in theory) – applicant may or may not follow, but Service believe implementing would avoid the likelihood of jeopardy to the species or adverse modification of designated critical habitat
    - 2. agency must notify USFWS/NMFS on final decision regarding implementation of RPAs
  - iv. **Incidental take statement – (what makes it worthwhile)**
    - 1. For actions constituting a “take” under Section 9, provides legal protection IF the terms and conditions implementing reasonable and prudent measures designed to minimize the impact of incidental take and are BINDING on the action agency to be afforded protection under Section 9 for “take.” Agency/applicant must demonstrate clear compliance with the terms and conditions and RPMs.
    - 2. “Take” – “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct” (intentional or negligent)

## Section 106 of the National Historic Preservation Act – Consultation

- Section 106 of the National Historic Preservation Act requires that any Federal agency shall, prior to the approval, of the expenditure of any Federal funds or prior to the issuance of any permit, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register.
- The Advisory Council on Historic Preservation is the Agency responsible for implementation of the Act, but all federal agencies must comply with the Act.
- The Council is made up of representatives from federal agencies, including the EPA Administrator.

Note: for the GHG permitting we relied on the applicant’s consultant to prepare a Cultural Resources Report for us, which typically covered steps 3 and 4. Applicants voluntarily did this for EPA. Otherwise, EPA would have to complete all steps and analysis.

### 1. Initiate the Section 106 Process

- Establish an Undertaking
  - *Undertaking* means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval.
    - If activity is not an undertaking or if it is an undertaking but the agency determines there is no potential to have an effect on a historic property, then no consultation required (paper transactions, no construction)
- Identify Consulting parties
  - SHPO/THPO
  - Tribes
  - Anyone interested (public, historic associations, anyone)

2. Define the Area of Potential Effect (APE) – includes areas infrastructure that will be disturbed or constructed for the project, i.e. not just limited to the footprint. Includes any area of ground disturbance and any area that could be visually impacted.
3. Identify Historic Properties within the APE – performed by a “qualified” historian or archaeologist
  - Includes both historic (above ground) and archaeological (below ground) properties
  - Determine if they are **listed on or if they are eligible for listing on the National Register** (other may be noted in a report, but Section 106 only applies to those that meet the National Register criteria for inclusion). National Historic Landmarks receive special protection under Sections 106 and 110 of the Act.
  - Cultural Resources Assessment
    - Desktop and Archive Records Research
    - Field survey - archaeology
    - Evaluate the historic significance of the properties found
4. Assess Adverse Effects
  - Apply Criteria – 36 CFR 800.5(a)
  - Can be direct (actual due to construction) or indirect impacts (visual, atmospheric, etc)
5. Agency makes a determination of effects
  - **No adverse effects to historic properties** - Obtain concurrence on the determination from the State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Officer (THPO) → consultation completed with concurrence.
  - **Adverse effects to historic properties** → continue consultation with consulting parties, SHPO, ACHP (if participating).
    - Memorandum of Agreement to resolve the adverse effects signed by the SHPO/THPO the Agency and invited signatories (e.g., applicant). → Consultation completed with the signing of the MOA.
6. Public notice – Agency is required by regulation to provide an opportunity for the public to comment on its determination of effect and resolution of the adverse effects. EPA accomplishes this as part of its public notice for a permit or other already established public notice practice.
7. Obtain concurrence from SHPO with no adverse effect determination OR signatures on an MOA to resolve adverse effects – final step